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6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF NEVADA**

8 DONALD MCCALLISTER,

Case No.: 2:18-cv-01140-JCM-PAL

9 Petitioner

ORDER

10 v.

11 BRIAN E. WILLIAMS, et al.,

12 Respondents
13

14 This habeas petition is before the court pursuant to petitioner Donald
15 McCallister's motion for stay and abeyance in accordance with *Rhines v. Weber* pending the
16 conclusion of his state postconviction proceedings (ECF No. 18). McCallister states that
17 respondents have indicated that, while they do not waive any procedural defenses, they do not
18 oppose a stay.

19 In *Rhines v. Weber*, 544 U.S. 269 (2005), the Supreme Court placed limitations upon the
20 discretion of the court to facilitate habeas petitioners' return to state court to exhaust claims. The
21 *Rhines* Court stated:

22 [S]tay and abeyance should be available only in limited circumstances.
23 Because granting a stay effectively excuses a petitioner's failure to present his
claims first to the state courts, stay and abeyance is only appropriate when the
district court determines there was good cause for the petitioner's failure to

1 exhaust his claims first in state court. Moreover, even if a petitioner had good
2 cause for that failure, the district court would abuse its discretion if it were to
3 grant him a stay when his unexhausted claims are plainly meritless. *Cf.* 28 U.S.C.
4 § 2254(b)(2) (“An application for a writ of habeas corpus may be denied on the
5 merits, notwithstanding the failure of the applicant to exhaust the remedies
6 available in the courts of the State”).

7 *Rhines*, 544 U.S. at 277.

8 The Court went on to state that, “[I]t likely would be an abuse of discretion for a district
9 court to deny a stay and to dismiss a mixed petition if the petitioner had good cause for his
10 failure to exhaust, his unexhausted claims are potentially meritorious, and there is no indication
11 that the petitioner engaged in intentionally dilatory litigation tactics.” *Id.* at 278.

12 Thus, the court may stay a petition containing both exhausted and unexhausted claims if:

13 (1) the habeas petitioner has good cause; (2) the unexhausted claims are potentially meritorious;
14 and (3) petitioner has not engaged in dilatory litigation tactics. *Rhines*, 544 U.S. at 277;

15 *Gonzalez v. Wong*, 667 F.3d 965, 977–80 (9th Cir. 2011). “[G]ood cause turns on whether the
16 petitioner can set forth a reasonable excuse, supported by sufficient evidence, to justify [the
17 failure to exhaust a claim in state court].” *Blake v. Baker*, 745 F.3d 977, 982 (9th Cir. 2014).

18 “While a bald assertion cannot amount to a showing of good cause, a reasonable excuse,
19 supported by evidence to justify a petitioner's failure to exhaust, will.” *Id.* An indication that the
20 standard is not particularly stringent can be found in *Pace v. DiGuglielmo*, 544 U.S. 408 (2005),
21 where the Supreme Court stated that: “[a] petitioner’s reasonable confusion about whether a state
22 filing would be timely will ordinarily constitute ‘good cause’ to excuse his failure to exhaust.”

23 *Pace*, 544 U.S. at 416 (citing *Rhines*, 544 U.S. at 278). *See also Jackson v. Roe*, 425 F.3d 654,
661-62 (9th Cir. 2005) (the application of an “extraordinary circumstances” standard does not
comport with the “good cause” standard prescribed by *Rhines*).

1 Petitioner, through counsel, points out that his counseled, first state postconviction habeas
2 corpus petition is pending before the Nevada Supreme Court (Case No. 76869), that his federal
3 petition includes claims from his state postconviction petition, and that if he prevails in state
4 court his federal petition would likely be moot. Moreover, as respondents have indicated that
5 they do not oppose the stay, the court shall grant the motion for stay.

6 Accordingly, petitioner's motion for a stay and abeyance of this federal habeas corpus
7 proceeding is granted. McCallister, through counsel, will need to file a motion to re-open the
8 case after his state postconviction proceedings have concluded.

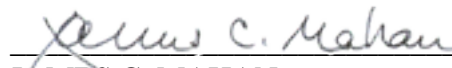
9 **IT IS THEREFORE ORDERED** that petitioner's motion for stay and abeyance (ECF
10 No. 18) is **GRANTED**.

11 **IT IS FURTHER ORDERED** that this action is **STAYED** pending final resolution of
12 petitioner's state proceedings.

13 **IT IS FURTHER ORDERED** that the grant of a stay is conditioned upon petitioner
14 returning to federal court with a motion to reopen the case within **45 days** of the issuance of the
15 remittitur by the Supreme Court of Nevada, at the conclusion of any state court proceedings.

16 **IT IS FURTHER ORDERED** that the Clerk **SHALL ADMINISTRATIVELY**
17 **CLOSE** this action, until such time as the court grants a motion to reopen the matter.

18
19 Dated: December 18, 2018.

20 
21 JAMES C. MAHAN
22 UNITED STATES DISTRICT JUDGE
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